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No. 94-1178

In The

Supreme Court of the United States

October Term, 1994

STEPHEN G. SULTENFUSS,

Petitioner,

v.

WAYNE SNOW, JR.,
(FORMER) CHAIRMAN OF THE GEORGIA STATE BOARD OF PARDONS AND PAROLES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia parole system creates an expectation of release protected by the due process clause of the Fourteenth Amendment?

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Come now Respondents in the above-captioned matter and present this their Response to the Petition for Writ of Certiorari and show reasons why the writ should be denied.

SUMMARY OF ARGUMENT

The court below correctly applied the test for determining whether a state has created a liberty interest and correctly held that the Georgia parole guidelines system does not create an expectation of release on parole. Petitioner focuses on irrelevant mandatory language and irrelevant substantive predicates in an attempt to find some promise of release.

Moreover, the Eleventh Circuit's decision is consistent with legislative intent as discerned by the rules of statutory interpretation. The decision below is also consistent with Georgia Supreme Court precedent and the administrative agency's interpretation of its obligations under the guidelines statute. Finally, the decision below is consistent with this Court's equitable considerations which encourage parole agencies to experiment in an effort to create fairer parole systems. There is no reason for further review by this Court.

STATEMENT OF THE CASE

As requested in Supreme Court Rule 15, Respondents here focus on Petitioner's mistatement of facts in the Petition. Petitioner makes three fundamental misstatements: 1) he suggests that the enactment of the guidelines statute "replaced" former parole statutes; 2) he confuses a grid recommended parole month with a Board recommended parole month; and 3) he raises issues of alleged false information in his parole which were not preserved below.

First, the guidelines statute did not "replace [Georgia's] parole statute" as suggested by Petitioner in his question presented. The new provision was not a replacement of any existing parole statute but amounted to a new section of the Parole Act. Ga. Laws 1980, p. 404. (Appendix one.)

Second, Petitioner confuses two phrases used by the Board under the guidelines system; "guidelines grid recommendation" and "tentative parole month." The grid recommended number of months to serve is the result of two factors: the crime severity level rating and the parole success likelihood score. The crime severity rating is a predetermined score which is based, except in exceptional circumstances, on the controlling crime of conviction. Petitioner's crime severity level was designated at level II on a scale of I to VII with I being the least severe.

The parole success likelihood score is a total score from eight weighted factors previously determined by the Board to provide some indication of recidivism. Out of a possible 20 points, Petitioner received a success score of 11. The success score and severity level are then applied to an established grid which produces a grid recommended months to serve. The grid recommended Petitioner serve ten months of his fifteen-year sentence. Petitioner's allegation is that he had an expectation to be released at ten months as recommended under the grid.

When it is convenient for his argument, Petitioner confuses the grid recommended months to serve with the tentative parole month. Petitioner ignores the next step in the parole consideration process which is the routing of the parole file to Board members for their votes. The

guidelines system calls for the grid recommendation to be routed with the file to Board members for Board recommendations. The Board members when voting may adopt the grid recommendation but do not necessarily have to. The Board's recommended months to serve (which may or may not be the same as the grid recommendation) is then added to the inmate's sentence computation date resulting in a tentative parole month.

Petitioner relies on selected excerpts from the Guidelines System manual for support of his erroneous conclusion that the tentative parole month is equivalent to the grid recommendation. Petitioner mistakenly misquotes to this Court Guidelines System Manual Chapter 8-27.01. Petitioner adds the words "from the Guidelines Grid" when quoting the policy statement to the Court. (Compare Petitioner's brief at pp. 5-6 with App. 107.)

These policy manual excerpts, do not support Petitioner's conclusions either that the tentative parole month automatically follows from the grid recommendation or that the Board created a promise of parole. Chapter 8-3.02 refers to the routing of the parole file to Board members for their determination as part of the guidelines system process. Chapters 8-26.01 and 8-27.01 define grid recommended months to serve which is the last step in the process by Board staff prior to routing the file for Board member vote. The Chapter defining a "tentative parole month," which was misquoted by Petitioner, expressly states that the tentative parole month calculation follows and directly relates to the Board's review and recommendation. Chapter 8-27.01. The tentative parole month is calculated from the "Board's tentative release decision."

Id. Thus, it is evident the tentative parole month is calculated from the Board's recommendation and not necessarily the grid recommendation. It follows from a proper reading of these provisions that the tentative parole month is not defined as an automatic computation from pre-determined elements, but instead results only after Board consideration of the guidelines grid and review of the individual circumstances in each offender's case.

The uncontradicted evidence is that this process was followed in Petitioner's case. The Board departed from the grid recommendation of ten months in Petitioner's case and recommended 61 months to serve or approximately five years of his fifteen-year sentence. The 61-month recommendation was added to his sentence computation date to determine tentative parole month of January, 1992. Petitioner was released on or about his tentative parole month.

Finally, Petitioner in his Statement of the Case attempts to mislead this Court by repeatedly describing alleged false information in his parole file. False information in Petitioner's parole file has never been an issue in this case. Nor was this issue preserved on appeal to the Eleventh Circuit. *See, e.g., Sultenfuss v. Snow,* 894 F.2d 1277 (11th Cir. 1990). The Board denies that there is any false or inaccurate information maintained in Petitioner's parole file. Moreover, the Board objects to any consideration of this allegation made for the first time on appeal. This is another example of Petitioner's efforts to confuse the simple question in this case: whether Petitioner had a reasonable expectation that he would be released according to the grid recommendation.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT.

The question presented in the instant petition is not novel. The Supreme Court on several occasions articulated the standard for determining when a state created a liberty interest. A liberty interest is created where (1) there are "substantive predicates to govern official decisionmaking" *and* (2) the "outcome to be reached upon a finding that the relevant criteria have been met" is "mandated." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). This Court "articulated a requirement . . . that the [provisions] contain 'explicitly mandatory language; i.e., specific directives to the decision maker that if the [provisions'] substantive predicates are present, a particular outcome *must* follow, in order to create a liberty interest." *Id.*, 490 U.S. at 463 (emphasis added). The application of this standard is not an exact science, as noted by the majority opinion below, but there are specific criteria which must be satisfied before due process is implicated.

The focus is correctly on the language of the provision in question. Before constitutional protections are invoked, there must be an articulated promise which legitimately raises the inmate's expectation. In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979) this Court found an entitlement to parole release or expectation of liberty was created by the use of the words "*shall order his release.*" *Id.*, 442 U.S. at 11 (emphasis added). Release was an expressly promised result.

In *Hewitt v. Helms*, this Court found a promise of liberty was created due to "explicitly mandatory language" which commanded to the decision maker that if the "substantive predicates" are not met, then administrative confinement will not occur. *Hewitt v. Helms*, 459 U.S. 460 (1983). The *Hewitt* statute promised that "if no behavior violation has occurred," and "the security concern is abated," then "*the inmate must be released.*" *Hewitt*, 459 U.S. at 472 (emphasis added).

Again, this Court in *Board of Pardons v. Allen*, found that the relevant statute "use[d] mandatory ('shall') to 'create a presumption that parole release will be granted' when the designated findings are made." *Board of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987), quoting *Greenholtz, supra*. The *Allen* parole statute directed that the Board "*shall release on parole*" and "a prisoner *shall be placed on parole.*" *Allen*, 482 U.S. at 376 (emphasis added).

The mandatory explicit language, however, creates a promise of parole only if it is relevant. *Thompson*, 490 U.S. at 454. In *Thompson* this Court found that although factors limited the prison decision makers' discretion and the statute may have mandatory language, the regulations at issue "lack[ed] the requisite *relevant* mandatory language" promising a specific outcome. *Id.* at 464. In *Thompson*, the regulations regarding visitation mandated that specific factors must be considered in visitation decisions. The regulation stopped short, however, of requiring that a particular result be reached. The provision stated that once these factors are considered the visitor "*may be excluded.*" *Id.* at 456, n.1. (emphasis added). Absent a mandated guaranteed outcome, the prisoner

cannot reasonably form an objective entitlement to any interest.

In analyzing the provisions in the present case, the court below correctly determined that no express promise of release was stated in the Georgia parole system. There simply is no expressed promise of parole in the Georgia guidelines system which creates a reasonable expectation that the inmate shall be released.

Petitioner, like the Plaintiff in *Thompson*, attempts to point to an expectation of parole release not by showing any mandated outcome or express promise of release, but instead by focusing on "irrelevant" mandatory language. Petitioner points to language which states the Board "shall" adopt or use a guidelines system. The result of Petitioner's standard would require procedural due process whenever a state adopted a guideline system; a notion expressly rejected in *Greenholtz* and *Allen* which held that the adoption of a parole system alone does not implicate due process.

This Court warned in *Thompson* against hunting for irrelevant mandatory language stating:

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for any imperative that might be found. The search is for relevant mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question.

Id., 490 U.S. at 464, n.4. At page 21 of the Petition, Petitioner states that the Georgia statute through use of

the word "shall" mandates implementation of a parole guideline system, mandates that the system shall be used in determining parole actions and mandates specific factors which must be considered. Petitioner fails to mention any mandate of release or mandated liberty upon fulfillment of specific factors. There is no such mandate in the Georgia guidelines statute. Absent a promise of release there is no expectation of release.

Likewise there is no "relevant mandatory language" in the policy statements relied upon by Petitioner.[1] The provision relied upon most heavily is Guidelines System Manual Chapter 8-27.01, which defines for Board staff how to calculate a tentative parole month. The provision states:

> The tentative parole month, during which the offender may expect to be released, absent new information or other cause to cancel the Board's tentative release decision, shall be calculated by adding the recommended months to serve to the compute-from date of the controlling sentence.

Guidelines System Manual, Chapter 8-27.01.[2] The "expectation" described in this statement is merely a date which the Board and the inmate anticipate the inmate's release. It is in no sense a promise of parole since it can be changed at any time based on "new information" or for

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[1] The policy statements relied upon by Petitioner are continually objected to by the Board as these are not a part of the record.

[2] Recommended months to serve here is the recommendation made by the Board and not the grid recommendation. This provision was misquoted in Petitioner's brief by inserting the words "from the Guidelines Grid."

any "other cause" that the Board decides. This Court previously held that a tentative parole release date does not create a liberty interest. *Jago v. Vancuren*, 454 U.S. 14 (1981) (a promise to release date is insufficient to create a liberty interest). *See also Staton v. Wainwright*, 665 F.2d 686 (11th Cir. 1982) and *Inmates v. Ohio Parole Authority*, 929 F.2d 233 (6th Cir. 1991). Such an expectation, even if mutual, creates a mere hope of release and is not an entitlement. This policy statement does not amount to a promise of release on the tentative parole month.[3]

Petitioner also focuses on irrelevant "substantive predicates" in an effort to demonstrate a promise of parole. As *Thompson* explains, any state provision which is under scrutiny, usually has limits on discretion which appear to either narrow or broaden discretion, or both. These criteria for parole are referred to as substantive predicates. Lists of specific factors that must be considered for parole appear to limit discretion; while broad grants of discretion such as "release only if it would be compatible with the inmate's welfare or the welfare of society," appear to create unlimited discretion. O.C.G.A. § 42-9-42. This Court's precedent is clear, however, that

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[3] Petitioner's reliance on this policy statement further confuses the issues since even assuming that this statement created a promise of release at Petitioner's tentative parole month, it does not promise release on Petitioner's grid recommended months to serve. Petitioner *was* released on his tentative parole month. Petitioner's claim that he had an expectation to be released on his tentative parole month does not support his claim that he had an expectation to be released on the grid recommendation date which is actually what the Petitioner seeks in this case.

provisions may include detailed factors which limit discretion or broad grants of discretion; neither is conclusive as to whether due process is implicated. Compare *Allen* and *Greenholtz* (the presence of general criteria such as "parole shall be ordered only for the best interest of society" which provides broad discretion but does not deprive the prisoner of the liberty interest) with *Thompson* (presence of many specific factors which must be considered does not, standing alone, create a liberty interest.) This Court correctly avoids the gray area of deciphering just how many limitations are enough to create an expectation of release. Instead, this court requires a clear promise of liberty upon the satisfaction of factors before the Constitution is implicated.

The parole provisions here in issue have both broad grants of discretionary authority as well as lists of specific factors for consideration. Compare O.C.G.A. § 42-9-40 (specific factors the Board must consider) with O.C.G.A. § 42-9-42(c) (broad discretion to parole only if in the best interest of society). Petitioner contends that the broad grant of discretion in O.C.G.A. § 42-9-42 is consistent with a liberty interest in parole. This contention is correct. However, Petitioner ignores the converse which is also true; a liberty interest is not created simply because there are detailed factors which limit discretion. Petitioner's focus on the number of factors which must be considered under the Georgia guidelines system is misplaced. *Thompson, supra*. These limiting factors are irrelevant substantive predicates because satisfaction of the factors is not an express precondition for parole release. The degree or number of limitations on discretion is irrelevant because there is no required release upon the fulfillment

of these factors. Adopting Petitioner's position is tantamount to concluding that whenever a guidelines system (with detailed factors for consideration) is adopted, due process is automatically implicated. Again, this position was rejected by this Court. Despite detailed factors that must be considered, there still remains no reasonable expectation of parole upon the satisfaction of these factors.

The correct due process analysis leads to one controlling question: Where is the promise of release on parole that an inmate is entitled to expect under the Georgia parole guidelines? There is no such mandate. Like the provisions in *Thompson*, the Georgia parole guidelines system stops short of mandating release on parole.

II. THE DECISION BELOW IS CONSISTENT WITH LEGISLATIVE INTENT, GEORGIA SUPREME COURT PRECEDENT AND ADMINISTRATIVE INTERPRETATION.

A. Legislative Intent.

Contrary to Petitioner's contentions, the decision below is consistent with the legislative intent to preserve Board discretion. In support of his position that the Georgia legislature intended to remove Board discretion, Petitioner relies upon various newspaper articles including an article from Tennessee. Even assuming that these newspaper articles were a part of the record, which they are not, and that the articles had conclusive authority concerning legislative intent, which they do not, a close reading of the articles actually supports the Board's position that the guidelines were enacted as an aid to making

more soundly based decisions and not as a substitute for the decision-making process. For example, an article quoted at page 11 of Petitioner's brief states that the guidelines "will be implemented to help determine whether inmates in Georgia prisons ought to be paroled. . . . " Indeed, the Board's position is that the guidelines are helpful in their determination, but guidelines are not a substitute for the determination. Not a single article quoted by Petitioner states that the guidelines were intended to be a substitute for the Parole Board's discretion.

The application of rules of statutory construction disproves Petitioner's theory of legislative intent. It is axiomatic that the first rule of statutory interpretation requires a court to look only at the plain language of the statute for its meaning. *See, e.g., Ardestani v. I.N.S.*, 502 U.S. 129 (1991). Evidence outside the plain language is considered only if there is some ambiguity. *Id.* As discussed in the previous section, none of the plain language in the statute mandates release on parole. There is no need to look further than the plain language to discern legislative intent.

A second rule of statutory construction requires the court to presume that legislators are aware of pre-existing laws still in existence. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) and *Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992). Newer statutes should be read consistently with pre-existing law. Already in existence at the time of the enactment of O.C.G.A. § 42-9-40 establishing the guidelines system, were the Georgia Constitution at Art. IV, Sec. II, Para. II and O.C.G.A. § 42-9-42. These provisions were not repealed by the guidelines statute.

The Constitution grants complete authority of executive clemency in the Parole Board. Likewise, O.C.G.A. § 42-9-42(c) provides a broad grant of discretionary power stating that the Board shall not parole an inmate unless his release will be compatible with his welfare and the welfare of society. Because neither of these provisions was repealed by the enactment of the guidelines statute, it may be presumed that the legislature did not intend for these broad grants of discretion to be replaced by the guidelines statute.

Moreover, if the guidelines statute were construed to limit Board discretion it would violate the Georgia Constitution. *See, e.g., Freeman v. The State*, 264 Ga. 27 (1994). The rules of statutory contruction require the courts to avoid this result if logically possible. *See, e.g., Chapman v. U.S.*, 500 U.S. 453 (1991) and *Walters v. Nat. Assn. of Radiation Survivors*, 468 U.S. 1323 (1984). The decision below correctly construed the guidelines statute consistent with the Georgia Constitution which presumably was the intent of the Georgia legislature.

B. Georgia Courts.

The decision below is also consistent with the decisions of Georgia's Supreme Court which hold that the Parole Board has constitutionally protected discretion in parole decisions. *See, e.g., Georgia State Board of Pardons and Paroles v. Turner*, 248 Ga. 767 (1982) (parole in Georgia is not mandated by rules or statutes and therefore the due process clause does not apply); and *Charron v. State Board of Pardons and Paroles*, 253 Ga. 274 (1984) (any legislation limiting the Board's constitutionally conferred power of

executive clemency is unconstitutional). As recently as 1994, Georgia Supreme Court discussed the Board's absolute constitutionally conferred discretionary power of parole which may not be legislatively infringed. *Freeman v. The State,* 264 Ga. 27 (1994). The Eleventh Circuit's decision is the only possible decision consistent with this state's interpretation of the Board's authority.

C. Administrative Interpretation.

Deference should be given to an agency's understanding of how it is required to operate. *See, e.g., Department of Treasury v. Federal Labor Relations Authority,* 494 U.S. 922 (1990) (great deference should be given to an administrative agency's interpretation of its statute). Georgia regulations unambiguously state the agency's interpretation. The Board interprets the guidelines statute as creating no promise of parole. The agency's regulation states:

> The parole decision guidelines system is an aid to the Board in making more consistent, soundly based and explainable parole decisions and does not create a liberty interest. The Board specifically reserves the right to exercise its discretion under Georgia law. . . .

Ga. Comp. R. & Regs. r. 475-3-.05(5). This is a clear statement of the Parole Board's interpretation of its state regulation. The court's decision below properly gives deference to the Board's interpretation.

III. THE DECISION BELOW IS CONSISTENT WITH THE SUPREME COURT'S EQUITABLE CONSIDERATIONS.

Petitioner contends it is "inconceivable" that the Board could adopt guidelines and then elect to depart from the grid recommendation thereby "ignoring" its own system. A review of various guidelines systems demonstrates that it is common to reserve discretionary power to depart from the grid recommendation whether or not due process is implicated. *See, e.g.*, 18 U.S.C. § 4206 (federal parole guidelines must be adopted but the Commission is authorized to depart from them if it "determines there is good cause for doing so.")

The Georgia guidelines system is an attempt to create equality throughout the state both in sentencing and time to serve. Guidelines System Manual Chapter 8-1.02. While a system of factors creating a formula for predicting parole success is an applaudable goal, such will never be completely obtained. Human circumstances are too varied to be able to mathematically compute justice. The system does provide, however, a rational basis for thoughtful consideration of parole decisions in an attempt to treat similar persons alike.

This Court recognizes the injustice of burdening a parole board with additional procedural requirements where it has made attempts to create a fairer decision-making process. This Court stated in *Greenholtz*:

> No ideal, error-free way to make parole-released decisions has been developed; the whole question has been and will continue to be the subject

> of experimentation. . . . Our system of federalism encourages this state experimentation. If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole.

Greenholtz, 442 U.S. at 14. The burdens of procedural due process do not attach simply because a state has adopted a parole system. There is only a need for procedural protections where an inmate is provided a clearly expressed promise of release. In the instant case, Petitioner fails to point to any expressed promise which formed an expectation of release, and, indeed, no such promise or expectation exists. Thus, the burdens of due process simply do not attach so as to require additional procedures when the Parole Board departs from the mechanical recommendation of the parole guidelines.

CONCLUSION

Respondents request that the instant Petition for Writ of Certiorari be denied.

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STATE BOARD OF PARDONS AND PAROLES – PAROLE GUIDELINES.

No. 879 (Senate Bill No. 521).

AN ACT

To amend an Act creating the State Board of Pardons and Paroles, approved February 5, 1943 (Ga. Laws 1943, p. 185), as amended, so as to require the Board to adopt, implement and maintain a parole guidelines system for determining parole action; to provide for other matters relative thereto; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act creating the State Board of Pardons and Paroles, approved February 5, 1943 (Ga. Laws 1943, p. 185), as amended, is hereby amended by adding a new section between Sections 12 and 13, to be designated Section 12A, to read as follows:

"Section 12A. (a) The Board shall adopt, implement and maintain a parole guidelines system for determining parole action. Such guidelines system shall be used in determining parole actions on all inmates, except those serving life sentences, who will become statutorily eligible for parole consideration. The system shall be consistent with the Board's primary goal of protecting society and shall consider the severity of the current offense, the prisoner's prior criminal history, prison conduct and social factors which the Board has found to have value in predicting the probability of further criminal behavior and successful adjustment under parole supervision.

(b) The guidelines system required by subsection (a) hereof shall be adopted by rules or regulations of the Board. Such rules or regulations shall be adopted in conformity with the Act known as the 'Georgia Administrative Procedure Act,' approved March 10, 1964 (Ga. Laws 1964, p. 338), as amended."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 20, 1980.